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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 33

JAMES P. MITCHELL, Secretary of Labor, *Petitioner*,

v.

OREGON FROZEN FOODS CO., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF FROZEN FOOD PACKERS

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INTRODUCTION

Reference to the opinions of the courts below, the statement of jurisdiction, and the pertinent provisions of the statute and rulings involved, are omitted pursuant to the provisions of Rule 42(5) of this Court.

QUESTIONS PRESENTED

1. Whether a frozen food packer who conducts operations which concededly qualify him as a member of an industry of a seasonal nature and who therefore is entitled under Section 7(b)(3) of the Fair Labor Standards Act, to an exemption from the overtime requirements of such Act, is nevertheless *not* qualified for the exemption when performing any of the following operations:

A. The packaging for market, subsequent to the harvesting season, of vegetables previously frozen and stored in bulk by the packer during such season, in the course of which it was impracticable to package the vegetables for market.

B. The packaging for market subsequent to the harvesting season, of a mixture of vegetables previously frozen and stored in bulk during such season, in part by such packer and in part by others, where it was impracticable to prepare the mixture except by using such previously frozen vegetables.

2. Whether the packaging and mixing of the bulk-frozen vegetables is the "first processing, . . . or packing of . . . perishable or seasonal fresh fruits or vegetables" within the meaning of the exemption from overtime requirements under Section 7(c) of the Act.

STATEMENT

A. The Interest of the National Association of Frozen Food Packers

The National Association of Frozen Food Packers, on whose behalf this brief is filed, is a non-profit trade association whose 125 member companies freeze approximately 75% of the total frozen fruit and vege-

table production in the United States. These member companies operate in the East, South, Middle West, Southwest, and the entire Pacific Coast, including the Northwest. More than half the membership engages solely in freezing operations. Oregon Frozen Foods Company is a member of the Association.

The questions involved in the *Oregon Frozen Foods* case are of direct and immediate concern to the members of the Association engaged in the freezing of fruits and vegetables. The interest of Oregon Frozen Foods Company in these questions differs from the interest of other Association members engaged in the freezing of fruits and vegetables only in the respect that an enforcement proceeding was instituted against Oregon. The widespread effect upon the frozen food industry of a reversal of the decision of the Court of Appeals in this case will appear from the Argument. The consent of the Solicitor General of the United States and of Oregon Frozen Foods Company to the filing of this brief has been obtained, as evidenced by letters from both parties submitted to the Clerk of this Court.

B. Facts

It is conceded by the Government that Oregon is entitled to both the seasonal industry exemption under Section 7(b)(3) of the Act and the "first processing" exemption under Section 7(c), during those weeks when freshly harvested vegetables are frozen and immediately packed in market-size packages or stored in bulk containers (Br. p. 8). It is only the packaging of vegetables which have been previously frozen and bulk-stored by Oregon or purchased in bulk from other processors, which is involved in this case.

The Statement of the Case in the brief for the Secretary of Labor requires the following additions and exceptions:

1. The basic exemption involved is that for seasonal industries under Section 7(b)(3) of the Fair Labor Standards Act, not the "first processing" exemption under Section 7(c), as the brief for the Government indicates. Availability of the former for operations in a seasonal industry is not dependent upon qualification for the latter, contrary to the Government's position. This point is developed in the Argument, Part 1.

2. Among the Agreed Facts incorporated in the Pretrial Order of the District Court were the following, as sumarized by the Court:

> "After being frozen, as much as possible of both corn and carrots is placed in consumer-sized packages and put in cold storage. At the peak of the season, due to limited packaging facilities, only part of each day's products can be packaged at that time. The excess is put in large bulk containers and kept in cold storage. At the end of the peak season the products are resorted and repackaged in consumer-size packages." (R. 52.)

The District Court found that ". . . due to the rush of harvest it is not practicable nor economically sound to package the entire pack from the harvest into consumer-sized packages as required by the defendant's market, and that it is necessary to bulk freeze a part of the corn and carrots coming into defendant's plant in the course of the harvest. That the latter repackaging after the rush of the harvest into consumer-size packages is a reasonable continuation of a part of 'the first processing of perishable or seasonal fresh fruits and vegetables.'." (R. 67-68.)

3. The characterization as "repackaging" of the packaging operations of Oregon subsequent to bulk freezing, is inaccurate, since Oregon for the first time "packaged" the corn and carrots which it had frozen, and the mixed vegetables which it had purchased, after their storage in bulk. In common commercial usage, a "package" of an article is one which is ready for market. The purchased components of Oregon's mixed vegetables were, therefore, not "packaged" by Oregon until they were packed together in the end form of the product, i.e., mixed vegetables for the consumer market, just as the corn and carrots previously frozen in bulk by Oregon were not "packaged" until they were placed in the market-size containers and cartons.

SUMMARY OF ARGUMENT

1. Oregon is engaged, as a packer of frozen vegetables, in an industry of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and is therefore entitled to the 14 weeks exemption provided by that section with respect to all of its operations of freezing and packaging seasonal vegetables. If Oregon were, as contended by the Government, engaged in packing operations in addition to those of an industry of a seasonal nature, it would nevertheless be entitled to the Section 7(b)(3) exemption with respect to all its operations which reasonably relate to the handling of seasonal fruits and vegetables. The Section 7(b)(3) exemption extends to every employer in an industry of a seasonal nature, even though the particular employer's operations may not be seasonal. E.g., *Domenico* v. *Mitchell*, 232 F. 2d 112 (C.A. 10). Since the freezing by Oregon of corn and carrots in bulk is admittedly first processing under the Government's theory of the case (Br. 25-26),

Oregon is entitled to the Section 7(b)(3) exemption for its operations with respect to the corn and carrots which it freezes in bulk and later packages in market-size containers, as well as for the packaging of mixed vegetables, some of which (corn and carrots) it has previously frozen itself and some of which (peas, green beans, baby lima beans) are purchased in bulk-frozen form from other freezers. The packaging operations in question are an essential part of Oregon's handling and packing of the seasonal commodities. Consequently, in conducting them, Oregon is engaged in an industry of a seasonal nature.

The Administrator of the Wages and Hours Division has provided by regulation that he will find an industry to be of a seasonal nature if it "engages in the handling, extracting, or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year not substantially greater than six months . . ." (29 C.F.R. (1958 Supp.) 526.3); and has determined that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry of a seasonal nature within the meaning of Section 7(b)(3)." (5 Fed. Reg. 3167). The Government contends that the term "first processing", as used in the determination under Section 7(b)(3) just quoted, has the meaning of that term as used in the exemption under Section 7(c), which is available for employers "engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits and vegetables." It seeks to deprive Oregon of the Section 7(b)(3) exemption with respect to its packaging of previously bulk-frozen vegetables on the ground that such operations are not "first processing." Even if

such operations were not first processing, however, the construction thus placed on the Act and administrative rulings is arbitrary and unreasonable, since the operations in question are clearly a part of the packing of seasonal commodities and therefore qualify Oregon as a member of an industry of a seasonal nature. Section 7(b)(3) is not restricted to "first processing." *Domenico* v. *Mitchell*, 232 F. 2d 112, 115 (C.A. 10).

2. The packaging by Oregon of corn and carrots previously frozen in bulk by it is "the first processing of, . . . or packing," of fresh fruits or vegetables within the meaning of Section 7(c). An administrative regulation (29 C.F.R. (1958 Supp.) 780.51(b)(1)) which purports to restrict the meaning of the quoted statutory language to operations which "are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable," is inconsistent with the statutory policy of protection to growers of fresh fruits and vegetables, which underlies the Section 7(c) exemption. *McComb* v. *Hunt Foods*, 167 F. 2d 905 (C.A. 9).

The exemption applies to the processing of certain commodities which are described as "perishable or seasonal." The purpose of Congress can be achieved only by reading the exempting language as applicable to all operations upon such commodities culminating in the final processing of the product. The beginning of further processing, such as cooking a frozen vegetable for use in a frozen dinner, is the point at which "first processing" should be regarded as completed, if full effect is to be given to that term. There is nothing in the exempting provision which requires that the operations in question be continuous, or that these be completed within a particular period of time, or that

the product remain "perishable" throughout. The term "perishable," moreover, logically includes the frozen product and is so defined in Section 1 of the Perishable Agricultural Commodities Act (46 Stat. 531, 7 U.S.C. 499 a *et seq.*)

3. As a practical matter, the small margin of profit in the industry would tend to reduce the volume of fresh fruits and vegetables contracted for and purchased for freezing, if the packaging of bulk-frozen commodities were not exempt under Sections 7(b)(3) and 7(c), in view of the low profit margin in the industry as indicated by the *Quarterly Report for Manufacturing Corporations*, Fourth Quarter 1958, and First Quarter, 1959, published by the Federal Trade Commission and the Securities and Exchange Commission (pages 15 and 21, respectively). It is not economically feasible to provide the necessary machinery to process all commodities frozen during the harvest season (R. 90, 105). The producer, whom the statute seeks to protect, would suffer the loss resulting from substantial curtailment of freezing operations. E.g., *Walling* v. *California Preserving Co., Inc.*, 74 F. Supp. 182 (N.D. Cal.).

4. The packaging by Oregon of vegetables purchased in bulk-frozen form from others is a part of the process of packing mixed vegetables and, as such, qualifies for the Section 7(c) exemption. The mixed vegetables form a substantial segment of the frozen vegetable pack, as shown by *Frozen Food Pack Statistics*, 1958 (Part 2 — Vegetables) published by the National Association of Frozen Food Packers (pages 8, 9, 11, 13, 15, 17, 21). The corn and carrots bulk-frozen and later packaged as the major components of the mixed vegetable product are not harvested during the same period

(R. 66); the peas, green beans, and limas which are used in the product, are obtained by Oregon at distances of 200 to 400 airline miles from Oregon's freezing plant, as is apparent from an inspection, on a map of the Northwestern portion of the United States, of the location of the plant and the supplying areas specified in the Pretrial Order (R. 19). Since fresh vegetables must be frozen promptly to obtain an acceptable product, the commodities used in mixed vegetables are not available to Oregon for that product unless they have been bulk frozen.[1]

It is evident that the packing of mixed vegetables would have to be discontinued by Oregon if the use of pre-frozen commodities were prevented by the necessity for payment of overtime for packaging operations. The problems created by variations in harvesting times and by the distances which some components of the product must be transported, can be overcome only by bulk freezing for later packaging. Obviously, these problems, by their very nature, are not peculiar to Oregon's operations.

The statute readily lends itself, as has been shown, to an interpretation which will be consistent with the purpose of the exemption and, it is submitted, should be so construed.

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[1] *The Freezing Preservation of Foods*, Tressler & Evers, 3rd Ed., 1957, pp. 340-343.

ARGUMENT

I.

A FROZEN FOOD PACKER MAY BE ENTITLED TO THE "SEASONAL INDUSTRY" EXEMPTION UNDER SECTION 7(b)(3) OF THE FAIR LABOR STANDARDS ACT REGARDLESS OF HIS STATUS WITH RESPECT TO THE SECTION 7(c) EXEMPTION FOR EMPLOYERS ENGAGED IN THE "FIRST PROCESSING, . . . OR PACKING . . . OF PERISHABLE OR SEASONAL FRESH FRUITS OR VEGETABLES"

The Brief for the Secretary of Labor presents the case as though the basic determination to be made were whether Oregon's operations entitle it to the exemption under Section 7(c) of the Act as an employer "engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits and vegetables." The brief refers to the broader exemption under Section 7(b)(3) which is applicable to *all* employers engaged in an industry found by the administrator to be of a seasonal nature, as an "additional exemption" (Br. 2, 5). It is stated in the introduction to the argument of the Government that—

> "The primary question in this case is whether Oregon is entitled to an exemption under Section 7(c) of the Fair Labor Standards Act when engaged only in repackaging vegetables which it has itself previously frozen and stored in bulk containers. If it is not entitled to that exemption, it follows that it is not entitled to the additional exemption under Section 7(b)(3) or to either exemption when it is also engaged in mixing and packaging vegetables previously frozen by others." (Br. 12-13.)

The essential basis for the quoted statement is the Administrator's interpretation of the term "first process-

ing" as being restricted to "a continuous series of operations" with no break in continuity.[2]

This view of the effect of the Section 7(b)(3) and Section 7(c) exemptions is unsupported by the text of the statute or the court decisions, and is not a necessary or reasonable construction of the Administrator's own regulations. Clearly, of the two, the broader exemption is the seasonal industry exemption under Section 7(b)(3). The test of whether it is available is not the operation of the individual employer but that of the industry as a whole. "If the industry is seasonal in nature, the benefit of such a finding extends to every employer in that industry, even though the particular employer's operations may not, in fact, be seasonal." *Wyatt* v. *Holtville Alfalfa Mills, Inc.*, 106 F. Supp. 624, 631 (S.D. Cal.); *Hendricks* v. *De Georgio Fruit Corp.*, 49 F. Supp. 573 (N.D. Cal.); *Domenico* v. *Mitchell*, 232 F. 2d 112 (C.A. 10).

The Administrator has determined that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry of a seasonal nature within the meaning of Section 7(b)(3);" 5 Fed. Reg. 3167. (R. 44-49.) Pursuing the argument that a decision as to the applicability of

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[2] The Administrative interpretation is set forth at 29 C.F.R. (1958 Supp.) 780.51(b)(1). It provides:

> "An employer who commences processing operations on a perishable commodity to which the exemption in Section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including by-product operations, which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable . . ."

the Section 7(c) exemption is dispositive of the question of entitlement to the Section 7(b)(3) exemption, the brief for the Government, referring to the determination of the Administrator under Section 7(b)(3), states:

> "Since that industry determination is cast in language identical to that of the Section 7(c) exemption, the reasons given above for the inapplicability of the Section 7(c) exemption to the repackaging and mixing operations are equally applicable here." (Br. 27.)

But the determination in question under Section 7(b)(3) cannot reasonably be construed to deprive of the benefit of the "seasonal industry" exemption, an employer whose operations allegedly extend beyond "first processing," if all such operations are a part of the processing of fresh vegetables.

A regulation of the Wage and Hour Division (29 C.F.R. (1958 Supp.) 526.3) establishes standards for determinations by the Administrator of industries of a seasonal nature within the meaning of Section 7(b)(3). The regulation provides that the Administrator will find an industry to be of a seasonal nature if it—

> "Engages in the handling, extracting, or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year not substantially greater than six months, and ceases production, apart from work such as maintenance, clerical, and sales work, in the remainder of the year because of the fact that, owing to climate or other conditions the materials handled, extracted, or processed . . . are not available . . ."

If the determination made by the Administrator that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" is applied in such a manner as to deprive Oregon of the Section 703(b)(3) exemption, as is urged in the brief for the Secretary, the determination is unreasonable and not in accordance with law or with a reasonable construction of the Administrator's own standard.

The argument of the Government amounts to an attempt to designate a portion of the operations of a processor, namely those which the Administrator considers "first processing," as a "branch of an industry," without regard to the fact that all of the processor's operations are an essential part of the packing of seasonal fruits and vegetables.[3] In *Domenico* v. *Mitchell*, 232 F. 2d 112 (C.A. 10) the Court dealt with a contention of the Government similar to that made in the instant proceeding. The Administrator had ruled that "the packing, handling, and preparing in their raw or natural state of perishable or seasonable fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and Part 526, as amended, of the regulations issued thereunder. 5 Fed. Reg. 3167." Domenico's operations included

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[3] The Government cites *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832 (C.A. 5), in support of its argument that Oregon's delayed packaging operations are not a part of an industry of a seasonal nature. (Br. 27, footnote 22). In that case, however, by-products (cattle feed and molasses for such feed) of citrus fruit processing were involved. The preparation of such by-products from processed citrus is not comparable to the operations of Oregon, all of which are a component part of its vegetable packing operation.

both "first processing" and additional operations which were not "first processing."

The Court held that if the ruling just quoted were applied to limit the definition of a seasonal industry with respect to fresh vegetables to "first processing" it would be in direct contravention of the mandate of Section 7(b)(3) making it the duty of the Administrator to define a "seasonal industry," and that "such a definition must be a reasonable one and must embrace all activities which reasonably relate to the handling of seasonable fruits and vegetables" (232 F. 2d at page 145). Consequently Domenico was entitled to the Section 7(b)(3) exemption for all of his seasonal operations. For like reasons, it is evident that the Administrator may not legally deprive Oregon of any of the benefits of the Section 7(b)(3) exemption on the ground that its operations of packaging and mixing bulk-frozen vegetables are not "first processing." All of Oregon's activities "reasonably relate" to the handling of seasonal fruits and vegetables, as did Domenico's, and are an integral part of the business of packing frozen vegetables.

The important distinction between the scope of the Section 7(b)(3) and Section 7(c) exemptions which has been outlined is not considered in the brief for the Secretary. Nor does the brief attempt to distinguish from the instant case the decision of the Court of Appeals for the Tenth Circuit in the *Domenico* case above cited. Instead, it essays in effect to convince this Court that the scope of the Section 7(b)(3) exemption is governed (1) by the Administrator's determination that "first processing" is a "branch of an industry of a seasonal nature" within the meaning of Section 7(b)(3), and (2) by the Administrator's interpretation

of "first processing" as a "continuous series of operations," which was made under another Section of the Act (Section 7(c)). This approach comports neither with reason nor judicial authority. As the preceding analysis shows, even if the Administrator's interpretation of "first processing" as used in the interpretative regulations under section 7(c) (footnote 2, *supra*) were conclusive under that section, it would not affect the right of Oregon to an exemption under Section 7(b)(3).[4]

II.

A FROZEN FOOD PACKER ENGAGED IN THE PACKAGING OF VEGETABLES WHICH IT HAS PREVIOUSLY FROZEN AND STORED IN BULK IS ENTITLED TO THE EXEMPTION FROM OVERTIME REQUIREMENTS PROVIDED UNDER SECTION 7(c)

A. The Administrative Interpretation

The administrative interpretation by the Administrator of the Wages and Hours Division excludes from "first processing," as used in Section 7(c), all operations other than those which "are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable".[5]

The effect of the decisions below was the rejection of this interpretation as unreasonable in the light of the objectives of the Fair Labor Standards Act. In its Opinion upon Petition for Rehearing the Court of Appeals was emphatic. It stated that "The attempt

[4] The Government assigns as a reason for the inapplicability of the Section 7(b)(3) exemption to the post-seasonal packaging operations of Oregon the fact that the bulk-frozen vegetables are not "fresh" (Br. 25). This argument, too, is wide of the mark. The statutory test for application of Section 7(b)(3) is seasonality, not freshness.

[5] 29 C.F.R. (1958 Supp.) 780.51(b)(1), footnote 2, *supra*.

to import into this field questions relating to business establishments and independent contractors illustrates the fact that the Government agency has never appreciated the purpose of Congress to alleviate the weight of the provisions of the Act in reference to farmers and orchardists" (R. 179). The same court had pointed out, in an earlier case, that the policy of protection to the growers of perishable and seasonal fresh fruits is of as much force as that of the protection of general industrial workers; and that the "hypertechnical" reasoning concerning "exceptions" and "exemptions" has no place in the consideration of cases such as the one at bar. *McComb* v. *Hunt Foods*, 167 F. 2d 905, 906 (C.A. 9), Certiorari denied, 335 U.S. 845.

There is nothing in the statute which requires the Administrator to place upon it the restrictive interpretation of "first processing" which he has adopted. Indeed, to have done so was to ignore the considerations emphasized in the opinion of the Court of Appeals in this case and in the *Hunt Foods* case, to which reference is above made.[6]

It is quite clear that the fact that the Section 7(c) exemption is applicable to "perishable or seasonal fresh fruits and vegetables" does not require that, throughout "first processing" operations the vegetables remain "perishable" or "fresh" in the sense of the Government's position; otherwise packaging of frozen vegetables could not be considered a part of "first processing" even in a "continuous series of operations." Moreover, the Section 7(c) exemption deals with per-

[6] For this reason alone, the Government's contention that the consistent administrative interpretation of the statute should control (Br. 22-24), is not persuasive, for the interpretation of the Administrator ignores a basic policy of the Act.

ishable or seasonal commodities. The only reasonable interpretation of the language of the exempting provision in question, it would seem, is to regard it as a description of the kind of commodities to which it is applicable rather than as a limitation upon the form of the commodities during the period of processing or as a limitation upon the time within which the operation must be completed. If the operation is upon seasonal fruits and vegetables it should qualify for the exemption until the end product has been processed.[7]

The "continuous series" limitation of the regulation departs from the basic concept which is inherent in the statutory language "first processing." The grammatical meaning of "first processing" is "a processing which precedes a further processing." Concededly, it includes packaging of the processed product "if performed immediately after the freezing" (Brief for the Secretary, p. 15); that is, "first processing" may include all operations necessary to make the end product at which the processor is aiming. We think it includes such operations when performed by Oregon.

There is nothing in the administrative interpretation relied upon by the Government, which purports to exclude post-seasonal operations from the benefits of the Section 7(c) exemption. It would, of course, be

[7] Not only is this interpretation logically indicated by the language of the statute and the character of industry operations, but it accords with the definition of "perishable agricultural commodity" in the Perishable Agricultural Commodities Act (46 Stat. 531, 7 U.S.C. 499 a., *et seq.*). Section 1 of that Act provides (§ 4 The term "perishable agricultural commodity" (A) means any of the following, whether or not frozen or packed in ice: Fresh fruits and vegetables of every kind and character . . ."

[8] 29 C.F.R. (1958 Supp.) 780.51(b), 1 (footnote 2, *supra*).

impracticable to enforce such a ruling since the beginning and close of a harvesting season cannot be pinpointed for such a purpose.

Under a literal construction of the interpretation in question, a lag of a day or a week between freezing and packaging, even though harvesting were still in progress, would disqualify the operation for an exemption. It would follow that if, in a given week, employees engaged in a "continuous series of operations" also performed delayed packaging operations, the employer would be entitled to no Section 7(c) exemption at all.[9] Apparently the Government does not so construe the ruling (Br. 8; although some of the language in its argument raises an ambiguity on the point). To do so would nullify the protection for producers which Congress intended to provide by the exempting provision.

Neither the Government's contention, which would exclude post-seasonal packing of previously frozen vegetables, nor that implied in the "continuous series of operations" test, is a necessary or reasonable construction of the statutory language. Both interpretations are avoided by regarding the term "first processing" as a description of an operation which is normal in the course of the employer's business and is necessary to complete the processing of the product being prepared.

The record shows, and the District Court found, that the reason for the delay between bulk freezing and final packaging of corn and carrots is the inability of Oregon

[9] *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, 832 (D.C. Ill.); *Puerto Rico Tobacco Market Co-op* v *McComb*, 181 F. 2d 697 (C.A. 1).

to complete the operation during the harvesting season in years of an abundant crop (R. 52, 67-68, 87, 104-105). In other years it is feasible to complete packaging in "a continuous series of operations." (R. 86-87)

The statement of Representative Norton on the floor of the House of Representatives that "there are certain seasonal commodities that should at least be exempted from the hours provisions of the bill during what we call the 'peak season'" (83 Cong. Rec. 7419) can hardly be regarded as a basis for confining the exemption to operations during the "peak season," in view of the practical limitations of packing facilities, and the evident fact that Representative Norton did not purport to give more than a general idea of the purpose of the exemption.

The only realistic dichotomy to be made in freezing operations is that between those operations which are completed with the final packaging of the frozen product being processed and such further processing as that product may thereafter undergo: for example, the cooking of frozen corn or peas in the manufacture of so-called "prepared frozen foods" such as "TV Dinners" or pot pies; the processing of frozen cherries, by cooking, sweetening, and thickening, for use in cherry pies; or the preparation of strawberry preserves from frozen strawberries.

This is the only kind of processing which can logically be regarded as beyond the scope of "first processing," if the arbitrary results which must follow from application of the Government's theory are to be avoided.

B. Economic Results of the Interpretation Urged by the Government

It seems evident that, if Oregon and other frozen food packers are forced to choose between the payment of overtime for delayed packaging of bulk-frozen fruits and vegetables on the one hand and, on the other, the avoidance of overtime payments by reduction of their volume to that which can be packaged in "a continuous series of operations," many will have to take the latter alternative. The exceedingly small margin of profit in the industry would make this choice seem inevitable.

The Federal Trade Commission and the Securities and Exchange Commission are responsible for the compilation and publication each calendar quarter, of figures indicating the margin of profit, stated as percentage of sales, of manufacturing corporations. For the year 1958 the average profit margin of the food industry, after Federal income taxes, was 2.2%; for the first quarter 1959 the margin was 2.1%. Profits on sales for all manufacturing corporations except newspapers were: in 1958, 4.1%, and in the first quarter of 1959, 4.7%.[10] The intensive competition in the fast developing frozen food industry is particularly conducive to low profits among processors.

The two 14 weeks exemptions under Sections 7(b)(3) and 7(c) account for more than half the year. The severe curtailment of these exemptions with respect to Oregon's necessarily delayed packaging operations, as advocated by the Government, so that time

[10] *Quarterly Financial Report for Manufacturing Corporations.* The figures set forth in the text are taken from the reports for the fourth quarter, 1958 (pp. 6, 15) and the first quarter 1959 (pp. 12, 21).

and one-half would be payable with respect to overtime on such operations, would clearly tend to frustrate the purpose of the exemptions, by discouraging the purchase by Oregon of commodities which could not be packed for market during the harvesting season in a "continuous series of operations." Overtime would have to be paid for delayed packaging operations, thus reducing or even eliminating the already slim margin of profit which the company can expect as a member of the frozen food industry.

Oregon employs some 300 production workers during the harvesting season for corn (R. 19), but, as the District Court found, is unable to carry its processing operations beyond bulk-freezing except in years of low production (R. 67-68, 86-87, 104-105). The alternatives to post-season packaging of this item are, therefore, to contract for and purchase less of the commodity, or to pay overtime for the delayed packaging operations, under the Government's interpretation of Section 7(c). It is not economically feasible to install facilities adequate to completely process all of the commodities frozen during the harvest season (R. 90, 105).

The language of Judge Fee in *Walling* v. *California Conserving Co., Inc.*, 74 F. Supp. 182 (N.D. Cal.), affirmed sub nom *McComb* v. *Hunt Foods*, 167 F. 2d 905 (C.A. 9), certiorari denied, 335 U.S. 845, is pertinent to this situation. Judge Fee stated in his opinion—

> "Modern manufacturing has developed a series of conditions upon which the Fair Labor Standards Act has been sustained. But the products of the soil wait for no man. These must be harvested and processed to a point where they may be preserved in short periods of time, without fail, or

> the farmer or grower will lose all the proceeds of a year of husbandry. If the primary processor, such as the defendant here, is compelled to keep a 40 hour week because the operation is otherwise rendered too expensive and as a result operates on that schedule, a proportion of the apple peelings and cores might become a total loss. Such a loss would fall squarely upon the producer." (74 F. Supp. at pages 183-184).

Likewise if, in the frozen food industry, processors such as Oregon are compelled to curtail their freezing operations to a point where they can be completed by packaging the product during the harvest season, the producer will be the prime sufferer. As we have seen, such a result is not required by Section 7(c) and is inconsistent with its purpose and with a normal reading of its language.

III.

A FROZEN FOOD PACKER IS ENTITLED TO THE SECTION 7(c) EXEMPTION FOR THE OPERATIONS OF MIXING AND PACKAGING VEGETABLES PREVIOUSLY FROZEN IN BULK BY OTHER PACKERS

A. Introduction

We have noted that the term "first processing" can have no sensible meaning in freezing practice except as applied to operations which are completed with the packaging of the product being processed, and which precede further processing into another product: for instance, the cooking of frozen peas for use in so-called "prepared frozen foods," such as frozen dinners, a product of a character entirely different from frozen peas. The use by Oregon in packing mixed vegetables, of bulk frozen lima beans, string beans and peas pur-

chased from others, is not comparable to this concept of "further processing."[11]

Under the Government's interpretation of the statute, Oregon would be entitled to the Section 7(c) exemption for the packing of mixed vegetables if the entire operation were accomplished in its plant without a break in its continuity. The end product is the same when it is made up of some vegetables which have been bulk-frozen by other packers and its processing is not complete until the combination of its various ingredients has been accomplished. It is, therefore, difficult to understand how it can logically be maintained that "first processing" has been completed until the end product—mixed vegetables—has been packed.

Neither the delay in completion of processing operations nor the fact that the operations are completed at a place of employment other than that where the purchased vegetables were bulk-frozen, provides a justification for the exclusion of Oregon's packaging operation from the concept of "first processing." This proposition is illustrated by the case of *McComb* v. *Hunt Foods, Inc.*, 167 F. 2d 905 (C.A. 9), certiorari denied, 335 U.S. 845. Defendant purchased parts of fresh apples consisting of peelings and cores from other manufacturers who had retained and dried the

[11] This concept is consistent with the interpretation by the Department of Agriculture of the Perishable Agricultural Commodities Act (46 Stat. 531, 7 U.S.C. 449 a., et seq.) Thus, it is stated in Form FV-444 (1-17-57), published by the United States Department of Agriculture, Agricultural Marketing Service paragraph 14. that:

> "REMARKS: The mixing of several kinds of sliced, chopped, or diced fruits or vegetables and packaging in cellophane or plastic bags does not change the character as the basic nature of the ingredients have not been changed."

pulp. The purchased peelings and cores were processed by defendant to obtain juice. The vendor of the peelings and cores had "first processed" the apples by removing the peelings and cores and drying the pulp. The defendant's operation was in a different place of employment from that of the vendor and was necessarily subsequent thereto. The Court held, nevertheless, that defendant's operations were within the "first processing" exemption.

Fine distinctions which ignore the purpose of the exemption would be required to differentiate that case from the instant case. If defendant in *Hunt Foods* had purchased the peels and cores in frozen form the better to preserve them for his own operations, would he thereby have become deprived of the Section 7(c) exemption? Or would the exemption have been unavailable for processing of the cores and peels had they been held under refrigeration at temperatures somewhat above freezing levels? Neither freezing nor refrigeration could reasonably be regarded as differentiating Oregon's position from that of the processor of apple peels and cores. In both cases, a processing operation had taken place with respect to the commodity involved, before it came into the hands of Hunt Foods or Oregon.

The Government contends that the bulk-frozen vegetables purchased by Oregon are no longer fresh (Br. 25), and that mixing them with other frozen vegetables is therefore not "first processing." By the same reasoning it could be maintained that the blanching operation which precedes freezing and packing in a continuous operation, deprives the vegetables of their "fresh" character and that the subsequent freezing itself is not "first processing." This the Government does not even contend.

B. Under the Government's Interpretation of the Statute It Would Not be Feasible for Oregon and Other Frozen Food Packers to Market Frozen Mixed Vegetables

1. It seems clear enough, as the courts below held, that the "first processing" of fresh vegetables is not completed until the processor has turned out the end product at which he is aiming. In the case of Oregon's operations the end product, mixed vegetables, cannot be produced until the ingredients are available, some of which cannot be frozen in Oregon's plant.[12] It is necessary that each constituent vegetable be frozen as it is harvested to await the availability of the others, which either are harvested during different periods of the year or, because they are not available locally, cannot be obtained by Oregon with the necessary promptness after harvesting to permit the packing of an acceptable product.

The District Court found that the active corn season for Oregon is from August 1 to October 10 and the active carrot season is from October 15 to December 1 (R. 66). It is evident, therefore, that corn and carrots, which constitute more than 60% of Oregon's pack of mixed vegetables (R. 65), would not be available for freezing in a "continuous series of operations," during the harvest season of either commodity. The fresh corn will not await the harvesting season for carrots. It must be bulk-frozen in advance. It seems fully evident,

[12] Oregon's Mixed vegetable pack is composed of green beans, baby lima beans, carrots, corn and peas, in accordance with the United States Standard for Grades of Frozen Mixed Vegetables, 7 C.F.R. 52.2131-52.2132. The industry volume of this product is shown below under "2". The Standard for Grades is, of course, the basis for government procurement and, under the theory of the case urged on behalf of the Secretary, Oregon could not comply with it, as appears hereinafter.

therefore, that because of the factor of divergence of packing seasons alone, Oregon's mixed vegetable pack would have to be discontinued if the principal constituent commodities were not bulk frozen to await the availability of all the constituents.

2. Even if the variation of production times presented no obstacle, Oregon would be unable to pack mixed vegetables without purchasing bulk-frozen green beans, limas and peas. It is inherent in the nature of fresh vegetables, as authoritative studies have shown, that a fundamental condition of producing an acceptable pack of the frozen commodity is prompt freezing after harvesting.[13] Hence, it is recognized in the industry as essential that freezing be accomplished within six hours after harvest.

Inspection of a map of the extreme northwestern area of the United States reveals that Ontario, Oregon, the site of Oregon's freezing plant, is in the Central portion of Eastern Oregon on the Snake River, which, at Ontario, forms the border between Oregon and Idaho. If harvesting times were the same—as the record shows they are not—corn and carrots could be obtained by Oregon locally for mixing and freezing together, within a reasonable time after harvesting. The green beans, however, are obtained by the processor from Salem, Oregon, an airline distance of some 300 miles from Ontario, beyond the Cascade Range and the Blue Mountains; peas from Walla Walla, Washington, almost two hundred miles distant across the Blue Mountains; and beans from Modesto, California, more than 400 airline miles away. (R. 19.)

[13] *The Freezing Preservation of Foods*, Tressler & Evers, 3rd Ed., 1957, pp. 340-343.

Obviously, if Oregon could obtain these vegetables from local sources, it would do so, if, for no other reason, to reduce hauling charges.

It is, therefore, evident that the only recourse for Oregon, if it is to process an acceptable pack of mixed vegetables, is to obtain peas, green beans, and limas in previously bulk-frozen form. The time required to transport and process these components of the mixture from the producing areas without preservation by freezing, would far exceed that permissible in good industry practice.

The problems faced by Oregon in this respect are not unique in the frozen food industry. Some plants are more favorably situated than others but the widespread necessity for bulk freezing of components of mixed vegetables is clearly reflected in the Frozen Food Pack Statistics published annually by the National Association of Frozen Food Packers. These reports are widely relied upon by industry and interested Government agencies, including the United States Department of Agriculture. The 1958 publication contains the following data showing, in millions of pounds, the United States production in 1958 of the five vegetables used in Oregon's mixed vegetable pack and the amounts of each vegetable frozen in bulk (containers of 50 pounds and over):[14]

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[14] *Frozen Food Pack Statistics*, 1958 (Part 2—Vegetables), National Association of Frozen Food Packers, Washington, D. C., March 31, 1959, pp. 8, 9, 11, 13, 17.

U. S. PRODUCTION DATA—1958

Frozen Commodity	Millions of Pounds Total	Bulk
Green Beans	156.0	18.6
Baby Limas	65.5	7.5
Carrots	53.7	25.9
Cut Corn	111.0	13.3
Green Peas	251.9	36.6

The bulk pack amounted to more than 100 million pounds out of a total of 638 million pounds. This, then, is a substantial portion of the industry's business in the commodities in question. This bulk pack was, of necessity, the source of the mixed vegetables pack for the reasons which have been stated in the case of Oregon. In fact, the major portion of the 1958 bulk pack of 100 million pounds went into combinations of mixed vegetables, mixtures of peas and carrots, and succotash, as shown by the following data:

MIXED FROZEN VEGETABLES—1958

Frozen Commodity	Million Lbs.[15] Total Production	$ Value[16] (Millions)
Mixed Vegetables	37.3	6.7
Peas & Carrots	24.5	3.0
Succotash	8.9	1.5

Nearly 68 million pounds of mixed vegetables, peas and carrots, and succotash were packed in 1958, which

[15] *Frozen Food Pack Statistics*, 1958 (Part 2—Vegetables), National Association of Frozen Food Packers, Washington, D. C., March 31, 1959, pp. 15, 17, 21.

[16] F.O.B. Plant, based upon average quotations, by frozen food packers, *New York Journal of Commerce*, August 24, 1959, p. 5.

had a value of more than eleven million dollars F.O.B. plant. The problems arising from variations in harvesting seasons and inability of packers not in the area of production to freeze one or more of the constituents of the three combinations of vegetables listed in the table, would render impractical the preparation of these products in any substantial amounts if the constituent commodities were not available in bulk-frozen form.

The statute is susceptible of an interpretation which will permit profitable production of these products, as the opinions of the District Court and the Court of Appeals have shown, and as we have emphasised in Point II of the Argument. It is submitted that the interpretation which we have urged is reasonable and practicable and should be adopted by this Court.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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